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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 592

MERNER HARDWARE AND LUMBER COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-7a) is reported at 345 F. 2d 770. The Board's Decision and Order (R. 70, 10-24)[1] are reported at 145 NLRB 1024.

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[1] "R." references are to Volume I of the record in the court below. "Tr." references are to the stenographic transcript, reproduced as Volume II, Transcript of Record. "G.C. Ex." refers to exhibits of the General Counsel; "Co. Ex." refers to those of the Company.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1965. The Company's petition for rehearing was denied on June 22, 1965. The petition for certiorari was filed on September 20, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals held that the Board's findings that the Company discharged five employees because of union activities, and unlawfully refused to recognize the union that a majority of its employees in an appropriate unit had designated as the bargaining representative, were supported by substantial evidence on the record as a whole. The question presented is whether in so holding the court applied erroneous standards of judicial review and departed from fair and orderly judicial review procedures.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in Appendix III to the petition for certiorari, pp. 8a-12a.

STATEMENT

Petitioner operates a wholesale and retail hardware store in Palo Alto, California (R. 10; 9, 4). On November 15, 1962, Irving Wilcox, a hardware

salesman, telephoned an agent of the Union [2] to invite him to talk with the employees (R. 12; Tr. 14). The next evening two Union representatives, John Blaiotta and William Tupper, met with sales clerks Wilcox, Wilbert Bentley, William McBrearty, Burnell Walker, and two others. All present filled out cards designating the Union as their collective bargaining representative, and some, including McBrearty and Bentley, took blank cards for distribution to other employees. (R. 12; Tr. 18-19, 252, 325-326.)

Along with employee Harry William Engman, the four above-named employees led an intense organizational campaign at the store (Tr. 213, 327-328, 617-618, 301, 24, 35, 39, 271-275, 244). Wilcox asked Supervisor McCorry to sign a card but he refused (Tr. 650). McBrearty asked McCorry and Supervisor Fuhrmann to sign. Engman unsuccessfully solicited the signature of Supervisor Overman, who gave Engman a pamphlet containing arguments against unions (R. 15, 17; Tr. 326-328, 650, 300-301). Supervisor Dickow asked employee Bentley "who is leading" the union effort, and was told, "it seems like everybody is in an uproar about it" (R. 16; 271-272). Due to the soliciting activities of these men, 17 employees, during November, filled out cards designating the Union as bargaining representative (R. 12; Tr. 254-257, 650, 300-301, 325-328, 364, 610; G.C. Ex. 3A-3R).

On December 7, Union agent Blaiotta, carrying these

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[2] Retail Store Employees Union, Local 428, Retail Clerks International Association, AFL-CIO.

designations with him, called upon Victor Riches, petitioner's executive vice-president (R. 12; Tr. 48-49, 242, 685), and told him that the Union had authorization cards from a majority of the Company's employees and that he desired to negotiate an agreement covering their working conditions (R. 12; Tr. 49-50).[3] When Riches asked to see what it was that the employees had signed, Blaiotta showed him a sample union authorization card (Tr. 50-51), and then took the signed cards out of his pocket and showed them to Riches, taking care to conceal the signatures (Tr. 51, 92). Blaiotta stated that, if Riches still had doubts as to the majority status of the Union, he "would be perfectly willing to call in the third party, some preacher or some lawyer or some professor, disinterested party, to check them against your payroll records" (R. 12; Tr. 51). Riches demurred to this proposal, insisting upon a Board election (R. 12; Tr. 51). He observed that, in contrast to immediate recognition, an election would enable him "to do everything within my power to defeat the union's efforts to organize the employees or the union coming in" (Tr. 51, 63). He added that the installation of the Union as bargaining representative at Merner "would be the straw that would break the camel's back," making it "forever impossible for us

[3] Blaiotta also gave Riches a letter written by the Union's secretary-treasurer, stating that the Union had been designated as the bargaining representative by "the majority of your retail and wholesale sales, clerical and other non-selling employees except lumber handlers, outside contract salesmen and teamsters" (R. 12; Tr. 52; G.C. Ex. 4).

to get this company on its feet" (R. 12; Tr. 164, 165, 167, 189).

The following afternoon Riches called McBrearty, Walker, Wilcox and Bentley into his office and summarily discharged them (R. 14; Tr. 105), and the following Monday General Manager Butch Buhl fired employee Engman (R. 14; Tr. 104, 106, 472). About a month later, when Bentley returned to the store in connection with some other matter, Assistant Store Manager Piroch inquired whether Bentley had found employment elsewhere, and stated: "Well, I want you to know I didn't have anything to do with this" (R. 16; Tr. 269-270).

The Board found that the Company discharged these five employees not for the reasons assigned by the Company, but because of their union activity, thereby violating Sections 8(a)(3) and (1) of the Act (R. 70, 20). The Board also found that the Union represented a majority of the employees in an appropriate unit[4] when it requested recognition on December 7, that the Company's refusal to recognize the Union was not motivated by a good-faith doubt as to the Union's majority status, and that such refusal, therefore, violated Sections 8(a)(5) and (1) (R. 70, 13). The Board ordered the Com-

[4] The Board found that all of the employees at petitioner's Palo Alto store, excluding lumber handlers, outside contract salesmen, truck drivers, guards, and supervisors as defined in the Act, constituted a unit appropriate for collective bargaining. The Board further found that there were 29 employees in the unit when the Union made its recognition demand, and that the Union had valid authorizations from 17 of these employees (R. 12, 21).

pany to cease and desist from the unfair labor practices found, to bargain with the Union, and to reinstate with back pay the employees it had discriminated against (R. 22-23).

The court of appeals sustained the Board's findings and enforced the Board's order in its entirety (Pet. 3a-7a).

ARGUMENT

1. A number of petitioner's contentions may be disposed of without extended discussion.

(*a*) Petitioner contends that the court of appeals erred in affirming the Board's finding that the discharge of the five employees was discriminatorily motivated (Pet. 33-36). This purely evidentiary issue plainly warrants no further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. Petitioner's claim that the employees were discharged for economic and other valid reasons was carefully considered by the Board, which found on adequate evidence that it was, rather, the employees' union activity that motivated the discharges (R. 13-20).

(*b*) The court of appeals' failure to write a long opinion (Pet. 13-16) presents no occasion for further review. Its opinion (Pet. 3a-7a) summarized petitioner's major contentions, and, after evaluating them under the appropriate standards for reviewing Board action, concluded that the Board's factual findings were supported by the record and that its unit determination was neither arbitrary nor capricious. In view of the clear lack of merit to the Company's challenge to the adequacy of the Board's findings, the

reviewing court in this case was not required to go further and set forth in its opinion an exhaustive analysis of the evidence.

(*c*) The court below did not err in denying petitioner's motion to augment the record on appeal (Pet. 16-17). Petitioner sought to include in the record a portion of the brief that it had filed with the Board, claiming that the Executive Secretary of the Board had inadvertently omitted it in transmitting the record to the court of appeals. In fact, the material in question was properly omitted. Section 10(e) of the National Labor Relations Act and 28 U.S.C. 2112 (b) provide that "the record to be filed in the court of appeals * * * shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency." Briefs and legal memoranda fall into none of these categories. See *Trust Co. of Florida* v. *Gault*, 69 F. 2d 133, 136 (C.A. 5); *United Gas Improvement Co.* v. *Securities and Exchange Commission*, 138 F. 2d 1010, 1022 (C.A. 3); *Black & Yates, Inc.* v. *Mahogany Association, Inc.*, 129 F. 2d 227, 237 (C.A. 3), certiorari denied, 317 U.S. 672; *Brown* v. *Wilson & Co., Inc.*, 230 F. 2d 280, 281 (C.A. 7). In any event, petitioner was not prejudiced by the omission, since the Board agreed that the material in question might be, and it was, lodged with the court of appeals for that court's consideration.

(*d*) Petitioner's motion for leave to adduce additional evidence on the competence of the discharged employees and on their understanding in signing the union cards (Pet. 17-18) was properly denied. A mo-

tion to adduce additional evidence in the review proceeding may be granted only upon a showing that "such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board" (Section 10(e) of the Act). The only suggested ground for such failure here was that petitioner was without the aid of counsel before the Board because Vice-President Riches, believing the complaint against the Company to be without merit, had decided that counsel was unnecessary. This was plainly an insubstantial reason. Cf. *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. 2d 567, 573 (C.A. 7).

In any event, petitioner was not prejudiced by denial of the motion. Insofar as it related to the competence of the discharged employees, the additional evidence offered by petitioner (1) was vague and unspecified and (2) was merely cumulative since the employees' competence had been extensively litigated at the Board hearing. See *National Labor Relations Board* v. *Southern Bleachery & Print Works*, 257 F. 2d 235, 241 (C.A. 4), certiorari denied, 359 U.S. 911; *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. 2d 567, 573 (C.A. 7). Insofar as it related to the employees' understanding in signing the union cards, it was immaterial. The affidavits in support of the motion offered no evidence that any employee was told his signature to an authorization card "would not mean the union would be a bargaining agent" (Pet. 17), and, although two or three affiants alleged that they

thought that the authorization cards had meant something else, such evidence would have been immaterial here (as we explain below, pp. 11-12).

(*e*) There is no substance to petitioner's contention (Pet. 29-33) that it was held to have violated Section 8(a)(5) of the Act notwithstanding a good-faith doubt as to the Union's majority status and the appropriateness of the unit in which recognition was sought. The Board found (R. 12-13) that petitioner refused recognition, not in good faith, but in order to undermine the Union. The court of appeals accepted this finding, which was fully justified by the record.

2. Petitioner's contention (Pet. 18-21) that the court of appeals erred in ruling that the Board's unit determination should not be disturbed "in the absence of a showing that such determination was arbitrary and capricious" (Pet. 6a) is refuted by decisions of this Court. As the Court stated in *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 380, "[u]nder Sec. 9(b) the Board is delegated the authority to determine the unit. The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion but to 'guarantee against arbitrary action by the Board' ". Accord: *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491.

Nor is there merit to petitioner's further contention (Pet. 21-25) that a unit limited to the Palo Alto store was inappropriate, and that a proper unit would

have included the employees at Progress Lumber Company as well. Progress was a separate corporation, albeit commonly owned, operating a lumber store located four miles away. The Board found that each store was subject to the immediate supervision of its own general manager and assistant general manager (C. Ex. 21; Tr. 452, 329), and that the employees at the Palo Alto store "form a homogeneous group, * * * have daily contract with each other and in general have an interest in making that store a viable enterprise so that their jobs may be more secure and so that opportunity for advancement may exist" (R. 11). In view of these circumstances, as well as the others it relied upon (R. 11), the Board reasonably concluded that the sales and clerical employees at the Palo Alto store possessed a distinct and substantial community of interest warranting separate representation. See *National Labor Relations Board* v. *Schill Steel Products, Inc.*, 340 F. 2d 568, 574 (C.A. 5); *National Labor Relations Board* v. *Smith*, 209 F. 2d 905 (C.A. 9), enforcing 101 NLRB 1172, 1178-1179.

3. Petitioner is unwarranted in the assertion that the court below sustained the Board's refusal-to-bargain finding on the basis that a "card majority" provides a valid designation of a bargaining representative "without regard to the circumstances under which the signatures were obtained" (Pet. 25). The Board applied no such principle. Rather, it found that "there is no substantial evidence to support the [Company's] assertion that any of the sign-

ers were under a misapprehension" as to the purpose of the cards (R. 12).[5]

The record amply supports this finding. The cards are unambiguous. They clearly authorize the Union to act as collective bargaining agent (Pet. 27, n. 3). To be sure, the testimony of employees Bentley and Walker may be read to suggest that they anticipated that the purpose of the cards was to obtain an election (Pet. 27-28). But it is equally consistent with evidence which showed that Union agents Tupper and Blaiotta told them, when they filled out the cards, that the cards would authorize the Union to act as the bargaining agent and would also be used to secure a Board-supervised election if the employer did not voluntarily accede to the Union's bargaining request (Tr. 373-375, 75, 18-19, 250, 219). There is thus no evidence that the employees were led to believe that the cards' *only* purpose was to obtain an election or that any other misrepresentations were made by the Union solicitors. It is well settled that in these circumstances, an "employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent." *Joy Silk Mills* v.

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[5] Petitioner suggests (Pet. 27) that valid authorization cards were secured only from 16 employees. In addition to counting the cards of 16 employees who affixed signatures to the cards, the Board also properly counted the card of Burnell Walker. For, although he had omitted his signature, he explained that this had been in error and that he had fully intended to join the Union (Tr. 218, 234-235).

National Labor Relations Board, 185 F. 2d 732, 743 (C.A. D.C.), certiorari denied, 341 U.S. 914.[6] Accord: *Colson Corp.* v. *National Labor Relations Board*, 59 LRRM 2512, 2516 (C.A. 8), June 14, 1965, petition for certiorari filed, No. 468, this Term; *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 754 (C.A. 6), petition for certiorari denied, October 11, 1965, No. 295, this Term; *National Labor Relations Board* v. *Gorbea, Perez & Morell, S. en C.*, 300 F. 2d 886, 887 (C.A. 1); *National Labor Relations Board* v. *Stow Mfg. Co.*, 217 F. 2d 900, 902 (C.A. 2), certiorari denied, 348 U.S. 964.

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[6] *National Labor Relations Board* v. *Koehler*, 328 F. 2d 770, 773 (C.A. 7), is distinguishable. In that case, unlike this one, there was evidence of misrepresentation by the union solicitors.

Nor was there any misrepresentation in the incident involving employee Warren (Pet. 27). Warren, a Stanford University senior, asked Union solicitor McBrearty if signing a card "would commit me to the Union." McBrearty accurately replied that it would not, since signing the card did not entail Union membership (Tr. 610-611, 620, 624). Warren's further testimony (Tr. 620) that, by this question, he meant to ask whether the card designated the Union as bargaining representative is simply another "afterthought" which "cannot negative the overt action of having signed a card designating a union as bargaining agent" (*Joy Silk Mills, supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1965.